

IN THE IOWA ADMINISTRATIVE HEARINGS DIVISION
CENTRAL PANEL BUREAU

In RE:

SUMMIT CARBON SOLUTIONS, LLC

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) Docket No. HLP-2021-0001
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**ORDER CONCERNING
MOTIONS TO COMPEL**

On July 31, 2023 a telephone hearing was held concerning motions to compel filed by Sierra Club Iowa Chapter (“Sierra Club”) and Iowa Farm Bureau Federation (“IFBF”). A number of Iowa counties (the “consolidated counties”), filed a joinder in the motions to compel seeking production of the same documents. Summit Carbon Solutions, LLC (“Summit”) resists the motions. A number of consolidated Iowa ethanol plants (“ethanol plants”) argued in support of Summit’s resistance.

Appearing at the hearing:

Wallace Taylor, Attorney for Sierra Club, Iowa Chapter
Christina Gruenhagen and David Meyers, Attorneys for Iowa Farm Bureau
Tim Whipple, Attorney for Iowa consolidated counties
Brant Leonard and Jess Vilsack, Attorneys for Summit Carbon Solutions, LLC
Lanny Zieman, Office of Consumer Advocate

Background

Stated very briefly and simply, this case involves a multi-state pipeline project proposed by Summit with the intent of capturing CO2 emissions from ethanol plants in Iowa and transporting the CO2 out of state for permanent sequestration. This project therefore necessarily involves agreements between Summit and various ethanol plants. These agreements, known as “offtake agreements,” are the crux of the dispute in this matter.

On May 16, 2023, Sierra Club filed a motion to compel discovery seeking “contracts or agreements, letters of intent, or similar documents Summit has with ethanol plants in Iowa.” (Sierra Club Motion to Compel, p. 1). On May 30, 2023, Summit filed its resistance to the motion to compel and motion for protective order. On July 20, 2023, a hearing was held before the undersigned. At that time, the parties reported having made progress on the matter, including a protective agreement, and the parties agreed the remaining issues could be narrowed in a supplemental motion to compel and resistance thereto. The undersigned issued a scheduling order for Sierra Club’s supplemental motion to compel and Summit’s resistance thereto. The order further encouraged all parties to promptly file any potential motions to compel in light of the swiftly approaching date for the hearing on the merits.

On July 25, 2023 Sierra Club filed its supplemental motion to compel along with a motion for confidential treatment of two documents, 1) the protective agreement and 2) a redacted offtake agreement with one of the ethanol plants. On the same date, IFBF filed a motion to compel discovery, with attachments A and B. On July 26, 2023, the consolidated counties filed a joinder in the motions to compel discovery. On July 27, 2023, Summit filed an omnibus response to the two motions to compel and joinder thereto, with attachments A through E.

The matter came before the undersigned for a telephone hearing on July 31, 2023. At that time, the parties appearing at the hearing advised they had previously executed a protective agreement. Also, Summit advised that it had produced redacted versions of the offtake agreements pursuant to the protective agreement for “Attorney’s eyes only.” The redactions relate to certain financial terms, which Summit regards as irrelevant, proprietary, and trade-secret information.

The only issue presented by the parties at the hearing was whether Summit should be compelled to produce the redacted portions of the offtake agreements.

Discussion

Under the now executed protective agreement, paragraph 6 allows a producing party to redact information in a document being produced if: 1) the information is not relevant; and, 2) the producing party reasonably and in good faith believes the information is highly sensitive and disclosure would create a substantial risk of economic injury that can not be avoided by less restrictive means. The same paragraph also allows any party receiving redacted information to request unredacted copies of the documents and if agreement is not reached, move the Board for appropriate relief.

Sierra Club makes the primary argument in its motion that the economic and financial aspects of Summit’s agreements with the ethanol plants are relevant to the ultimate issue for the Iowa Utilities Board to determine concerning whether to grant a permit. Sierra Club, relying on *Kvalheim v. Horace Mann Life Ins. Co.*, 219 N.W.2d 533 (Iowa 1974), argued that Summit must show itself to be a common carrier, holding itself out to carry for all persons who may choose to hire it, in order to be granted the power of eminent domain. Sierra Club further argues that in *Puntenney v. IUB*, 928 N.W.2d 829 (Iowa 2019), the Iowa Supreme Court has discussed standards for identification of a pipeline as a common carrier, which includes a showing that a pipeline reserves a certain percentage (in that case 10%) of its capacity for all uncommitted shippers or “walk-up” shippers. Sierra’s reasoning for disclosure of the presently redacted portions of the offtake agreements appears to be that without the specific information pricing information, Sierra club cannot intelligently or effectively argue whether or not an appropriate reserve amount exists within the pipeline that would be available for “walk-up” shippers.

Sierra Club also argues, apparently for the first time, that the redacted information is not trade secret information and therefore should not be subject to redaction, particularly given the parties executed protective agreement, which indicates these documents to be for “Attorney’s eyes only,” meaning that only the attorneys for the parties may view the documents. The documents may not be viewed by the parties

themselves. Sierra Club further argued at hearing that the IUB is well suited to deal with confidential information during the course of the hearing, have done so in the past, to avoid breach of confidentiality. Essentially, Sierra Club argued that although it believed the redacted information was likely not trade secret information, the protective agreement is sufficient to remedy any concerns held by Summit and prevent inappropriate disclosure.

IFBF stated their original request for offtake agreements was for the purpose of analyzing the economic benefit of the project, to determine whether the project promotes the public convenience and necessity, and to assess Summit's ability to pay damages resulting from the construction and operation of a hazardous liquid pipeline pursuant to Iowa Administrative Code section 199 – 13.3(1)(d).

IFBF received the redacted versions of the offtake agreements (as have other parties to this matter) and now argues that the protective agreement signed by the parties "already addresses any concern Summit could have relating to providing proprietary or confidential business information or 'commercially sensitive' information." (IFBF Motion to Compel, p. 3).

IFBF also argues that the unredacted versions of the offtake agreements go to the primary issue of whether the pipeline "promotes the public convenience and necessity" under Iowa Code section 479B.9. In support of this, IFBF states "Summit has alleged that the secondary economic benefits of the project to the ethanol industry and agriculture generally help satisfy this standard" that it does, in fact promote the public convenience and necessity, which Summit must prove to the IUB in order to be granted a permit. (IFBF Motion to Compel, p. 4). IFBF points to Summit's witnesses providing direct testimony about the economic benefits as evidence of the project promoting the public convenience and necessity. IFBF provides eight separate examples of this testimony in its motion, which are stated below:

a. "Summit's 12 Iowa ethanol partners would earn more for producing low-carbon renewable fuel, strengthening the economic competitiveness and long-term viability of ethanol. As a result, this benefits Iowa's family farms by supporting a key market for their crop production as the demand for lower carbon solutions increases." Summit Pirolli Direct Testimony, pp. 4-5

b. "Approximately 3.28 million metric tons of CO₂ per year is currently anticipated from the 12 partnering ethanol facilities in Iowa, which is expected to grow over time." Summit Pirolli Direct Testimony, p. 6.

c. "In addition to the environmental attributes, the Project is eligible to receive federal 45Q tax credits. This credit has traditionally received bi-partisan support and was enhanced within the Inflation Reduction Act to \$85 per qualifying metric ton of carbon oxides permanently sequestered. Additional opportunities to maximize the value of carbon removals through the Inflation Reduction Act (e.g., Section 45Z – Clean Fuels Production Credit, Section 40B – Sustainable Aviation Fuel Credit), clean hydrogen credits, are currently under evaluation, as are the strict requirements that must be met. Summit's business model was developed to align

incentives with our partners through a sharing mechanism of the available revenue streams.” Summit Pirolli Direct Testimony, pp. 8-9.

d. “We estimate that participating ethanol facilities will earn, on a net basis, 10-35 cents more per gallon.” Summit Pirolli Direct Testimony, p. 9.

e. “The ethanol partners and Summit share the revenues and operating costs.” Summit Pirolli Direct Testimony, p. 9.

f. “The recently passed Inflation Reduction Act is providing further incentives to lower the “carbon footprint” for ethanol producers in United States. This incentive is equivalent to 2 cents per gallon for each carbon intensity score below 50. The average score that is gained by sequestering CO₂ that originates in Iowa and transported to North Dakota through the SCS pipeline is 30 points. Therefore, the total benefit for sequestering CO₂ through SCS is nearly \$0.60/gallon of ethanol and that in turn calculates to \$1.8[0] per bushel.” Summit Broghammer Direct Testimony, pp. 2-3

g. “The returns for Iowa ethanol plants will vary from location to location, but it cannot be denied that the benefit to the Iowa corn producers is several times that of the return per bushel that Iowa ethanol plant have made.” Summit Broghammer Direct Testimony, p. 3.

h. “Sequestering carbon dioxide from these participating ethanol plants significantly lowers the ethanol plants’ carbon intensity (“CI”) scores providing access to higher margin markets, and ultimately improves the economic return to the ethanol plants.” Summit Powell Direct Testimony, p. 5.

(IFBF Motion to Compel, pp. 4-5). IFBF’s argument is that without the redacted information, which according to Summit contains “specific financial details” of the offtake agreements, IFBF has no ability to verify or challenge the statements of economic benefit provided by Summit’s witnesses. (Summit Response, p. 11). Further, IFBF questions how the IUB can evaluate whether Summit’s project will or will not promote the public convenience and necessity through secondary economic benefits to the ethanol and agricultural industry without relevant financial data “necessary to verify the representations made by Summit witnesses.” (IFBF Motion to Compel, p. 7).

Lastly, IFBF argued at hearing that the redactions generally run contrary to the basic concept of open and fair discovery under the Iowa Rules of Civil Procedure.

Summit argues that the redacted information is not relevant to any issue to be determined by the IUB and the information is proprietary, trade secret data. Only Sierra Club took the position at hearing that the information is not proprietary or trade secret information. IFBF and the consolidated counties made no such claim, but asserted the protective agreement provides sufficient protection for sensitive information.

In support of its argument that the redacted information is not relevant, Summit argues that the information is not needed to verify its claims about the economic

benefits of the project. Summit argues that the redacted information does not relate to whether an ethanol plant can reduce its CI score, or whether the project will generate tax and/or carbon credits, or how CI reduction helps the ethanol and agricultural industries. It argues that the specific pricing formula and related information in each offtake agreement does not change the fact that “[t]he project will capture and sequester CO₂, reduce CI scores, and generate tax credits and carbon credits *independent of* the specific redacted financial terms.” (Summit Response, p. 12).

Summit further argues that the redacted portions are not relevant to whether the IUB should grant eminent domain authority to Summit. More specifically, that the argument of the Sierra Club that Summit must be identified as a “common carrier” in order to be granted the power of eminent domain, is incorrect. The only thing the board must decide is whether the pipeline company has been found “to promote the public convenience and necessity”. (Summit Response, p. 13). Further, Summit’s Chief Commercial Officer has testified under oath that “Summit is conducting an open season and reserving 10% of the capacity for unaffiliated ‘walk-up’ shippers,” thus negating Sierra Club’s concern and need for the redacted information. (Summit Response, p. 14).

Summit also commits a significant portion of its argument to the notion that even with a protective order, the commercially sensitive redacted data is likely to be disclosed beyond the bounds of the protective agreement. Summit basis this argument on its characterization that Brian Jorde who represents more than 140 landowners is an “anti-pipeline warrior” and the Sierra Club “cannot be trusted to respect the extreme sensitivity of the redacted portions.” (Summit Response pp. 2, 8).

Law and Analysis

In Iowa, “[l]itigants are entitled to every person’s evidence, and the law favors full access to relevant information.” *State ex rel. Miller v. National Dietary Research, Inc.*, 454 N.W.2d 820, at 822-823 (Iowa 1990). “[T]here is no true privilege against discovery of trade secrets or other confidential information.” *Mediacom v. City of Spencer*, 682 N.W.2d 62, at 66 (Iowa 2004). “[O]ur discovery rules are to be liberally construed to effectuate the disclosure of relevant information.” *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 389 (Iowa 1983).

Iowa Rule of Civil Procedure, 1.503(3) provides:

In general. *Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action*, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things, the identity and location of persons having knowledge of any discoverable matter, and the identity of witnesses the party expects to call to testify at the trial. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(emphasis added). There is no real claim of privilege in this case to protect the redacted information from disclosure. Rather, Summit's objection to disclosure is based in relevance and the confidential, proprietary, or trade secret nature of the information.

Iowa Rule of Civil Procedure, 1.504(1) provides in relevant part:

Upon motion by a party or by the person from whom discovery is sought or by any person who may be affected thereby, and for good cause shown, the court in which the action is pending . . .

a. May make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

— — —

(7) That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.

The "designated way" referred to in the rule, regularly includes the use of protective orders.

Turning first to the question of relevance, Summit's objection that the redacted portion is not relevant is less persuasive than IFBF's argument that Summit itself has promoted the economic benefits derived, at least in part by the redacted information, leading to statements about specific earnings or savings to individual ethanol plans and the broader impact on the ethanol and agricultural industry. It is these economic benefits that have been promoted as a basis for the assertion that the pipeline project "promotes the public convenience and necessity." Iowa Code section 479B.9. This is the question the IUB must determine following a hearing on the merits.

Sierra Club and IFBF's assertions that without the redacted information, it lacks the ability to verify the statements of Summit's witnesses who are promoting the economic benefits of the project, and limits their ability to effectively prepare for hearing, is found to be reasonable by the undersigned. Further, construing broadly the applicable discovery rules as instructed by case law, providing the previously redacted information is appropriate. This remains true, under the standard applicable in Iowa Code section 479B.9, despite redactions being allowed in other jurisdictions, which are not controlling here.

However, the second question is Summit's argument that the information is proprietary, trade secret information. Only Sierra Club argues that the information is not trade secret. But, Sierra Club also agreed at the hearing that it had no objection to receiving the previously redacted information under the classification of "Highly Confidential – Attorney's eyes only," as described in the protective agreement. Neither IFBF nor the consolidated counties objected to the redacted information being viewed as trade secret and provided under the classification of "Highly Confidential – Attorney's eyes only"

Based on the position of the movants, it is not necessary for the undersigned to determine at this stage whether or not the information is trade secret in light of the agreement that if the information is ordered to be disclosed, it may be identified as “Highly Classified – Attorney eyes only,” as though it were trade secret information.

Summit argues that because this is no ordinary permitting case, the information sought will not be adequately protected by a protective order, even when designated as “Highly Classified - Attorney’s eyes only.” Summit argues that Brian Jorde the “anti-pipeline warrior” and Sierra Club should not be trusted to follow a protective order. (Summit Response pp. 2, 8). While this matter is certainly a case that has generated significant attention and stirred passionate responses, there is not sufficient evidence presented by Summit that either Mr. Jorde or Sierra Club will violate a lawfully imposed protective order. Indeed, there is no evidence that Mr. Jorde or Sierra Club have previously violated the present protective agreement, or any prior protective orders issued in other jurisdictions. Although Summit may be suspicious, there is insufficient evidence for this tribunal to conclude that a violation of a protective order is likely to occur.

IT IS THEREFORE ORDERED:

- 1) The presently executed protective agreement shall, upon the issuance of this order, be deemed a protective order in this case and the entirety thereof is hereby incorporated by reference as if fully set forth herein.
- 2) That Summit shall provide within 2 working days to the movants the previously redacted information in the offtake agreements by providing said information under the category of “Highly Confidential – Attorney’s Eyes Only” as provided in the protective order.
- 3) The motion for confidential treatment of documents filed by Sierra Club on July 25, 2023 is granted and the documents submitted therewith shall be held by IUB in a confidential status.

Dated this 2nd day of August, 2023.



Toby J. Gordon
Administrative Law Judge
Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Wallace State Office Building, 3rd Floor
Des Moines, Iowa 50319
toby.gordon@dia.iowa.gov
Tel: (515) 281-7164
Fax: (515) 281-4477

cc: Wallace Taylor, Attorney for Sierra Club, Iowa Chapter
Christina Gruenhagen and David Meyers, Attorneys for Iowa Farm Bureau
Tim Whipple, Attorney for the Iowa consolidated counties
Brant Leonard and Jess Vilsack, Attorneys for Summit Carbon Solutions, LLC
Lanny Zieman, Office of Consumer Advocate